UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JOHN M. MARTOCCIA — CASE NO. 94-62983

Debtor — Chapter 7

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On February 4, 1997, John M. Martoccia ("Debtor") filed a motion ("Motion") seeking to vacate federal tax liens on the basis that they were filed in violation of § 362(a) of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). The Internal Revenue Service ("IRS") filed a cross-motion ("Cross-Motion") on July 21, 1997, seeking to lift the automatic stay ("Stay") *nunc pro tunc* to December 22, 1995, the date the IRS filed its Notice of Federal Tax Lien ("Tax Lien"), to allow the Tax Lien to constitute a valid lien in the event that the Court finds the IRS

to be in violation of the Stay.[1] The Motion was originally scheduled to be heard on February 25, 1997, and was adjourned several times thereafter on the consent of the parties.

The Court heard oral argument on the Motion and the Cross-Motion at its regular motion term in Utica, New York on August 19, 1997, and adjourned the matter until September 30, 1997, to allow the parties the opportunity to file additional memoranda of law. On September 30, 1997, the Court ruled that the tax liens were filed in violation of the Stay imposed by § 362(a) of the Code and adjourned the Cross-Motion until October 28, 1997. The matter was submitted for decision on October 28, 1997.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of these contested matters pursuant to 28 U.S.C. §§ 1334(b), 157(b)(1) and (b)(2)(A), (G), (K).

FACTS

On November 1, 1994, the Debtor filed a voluntary petition seeking relief pursuant to chapter 7 of the Code. On June 12, 1995, June 19, 1995, June 26, 1995, and July 3, 1995, the IRS made income tax assessments ("Assessments") against the Debtor for the taxable years from 1986-1989, respectively. *See* Exhibit "A" of the Debtor's Motion. On December 8, 1995, the

[1] The Court interprets the Cross-Motion of the IRS to lift the automatic stay *nunc pro tunc* as a request for an annulment of the automatic stay.

Court erroneously issued an Order of Discharge of Debtor that was subsequently vacated by an Order of the Court entered on December 15, 1995. On December 22, 1995, the IRS filed its Tax Lien with the Oneida County New York Clerk's Office with respect to property of the Debtor in connection with the Assessments totaling $170,862.50. *See id*. On or about February 5, 1996, the Tax Lien was extended or an additional lien was filed by the IRS. *See* Debtor's Motion at ¶ 5 and Exhibit "B." Pursuant to an Order, dated October 3, 1997, the Court held that the tax liens were filed in violation of the Stay pursuant to Code § 362(a).[2]

ARGUMENTS

The IRS contends that the Stay should be annulled to December 22, 1995, the date the Tax Lien was filed, so as to allow the Tax Lien to be valid. The IRS claims that its violation of the Stay was not a willful act because the Tax Lien was filed in reliance upon the initial Order of Discharge issued by the Court on December 8, 1995. The IRS asserts that it acted without knowledge of the subsequent Order of the Court entered on December 15, 1995, that vacated the Discharge Order. The IRS argues that if the Court does not grant its requested relief from the Stay, the IRS' lien priority may become subordinate to the interest of post-petition creditors and may result in a substantial and unjustifiable prejudice to the IRS. Also, the IRS contends that the Debtor will suffer no harm if the Court grants its requested relief from the Stay.

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[2]Specifically, the Court concluded that (1) the "Final Report and Account of Trustee in Case Where No Distribution is Made" dated February 2, 1995, did not operate to abandon or transfer the real property out of the estate pursuant to Code § 362(b)(9)(D); (2) on the date the tax liens were filed the real property remained property of the estate; and (3) the filing of the said liens violated the automatic stay imposed by Code § 362(a).

The Debtor contends that the Tax Lien filed by the IRS in violation of Code § 362(a) is a nullity and should be vacated. The Debtor asks that the Court balance the prejudices to determine whether to grant the IRS retroactive relief from the Stay. Specifically, the Debtor requests the Court to consider the harm he will suffer as a consequence of the requested relief, to wit: his perceived inability to consummate a stipulation made in New York State Supreme Court in which he agreed to replace his former wife's pre-petition judgment liens with a mortgage lien.[3] The Debtor further argues that had the IRS moved the Court to lift the Stay for purposes of filing the Tax Lien prior to December 22, 1995, there would have been no basis upon which to grant such relief. Similarly, the Debtor asserts that there is now no such basis to grant an annulment of the Stay.

DISCUSSION

Code § 362 operates as a broad stay of actions against the debtor or property of the estate. *See* 3 COLLIER ON BANKRUPTCY ¶ 362.03, at 362-13 (Lawrence P. King ed., 15th ed. rev. 1997). The Second Circuit, along with the majority of circuits, takes the position that a violation of the automatic stay is void and without effect. *See, e.g., Schwartz v. United States* (*In re Schwartz*), 954 F.2d 569, 572 (9th Cir. 1991)*; 48th St. Steakhouse, Inc. v. Rockefeller Group, Inc.* (*In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987). However, the bankruptcy court is

[3] The Court notes by a review of its docket that an adversary proceeding was commenced February 2, 1995, pursuant to Code § 523(a)(5), to determine the non-dischargeability of a debt obligation to the Debtor's former wife, Brenda Sears Martoccia, and the same was settled on or about April 26, 1996.

expressly authorized to grant retroactive relief from the automatic stay pursuant to Code § 362(d)[4] thereby validating an action that would otherwise be void *ab initio*.[5] *See Soares v. Brockton Credit Union* (*In re Soares*), 107 F.3d 969, 976 (1st Cir. 1997)*; In re Siciliano,* 13 F.3d 748, 351 (3d Cir. 1994). Although a bankruptcy court has the power to retroactively annul the automatic stay, such relief should be exercised sparingly. *See, e.g., In re Soares*, 107 F.3d at 978 (holding that retroactive relief is only warranted in compelling circumstances)*; In re Albany Partners*, 749 F.2d at 675 (holding that retroactive relief is appropriate only in *limited* circumstances).

Whether "cause" exists to grant relief from the automatic stay is examined on a case by case basis.[6] *See Sonnax Indus., Inc. v. Tri Component Products Corp.* (*In re Sonnax Ind*., *Inc.*), 907 F.2d 1280, 1286 (2d Cir. 1990).[7] The IRS, having brought this motion, bears the burden of

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[4]"On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, *annulling*, modifying, or conditioning such stay." 11 U.S.C. § 362(d)(emphasis added).

[5]The word "annulling" in this provision evidences the power of the bankruptcy courts to grant relief from the stay which has a retroactive effect; "otherwise its inclusion, next to "terminating", would be superfluous." *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir.1984).

[6]The IRS has not specifically relied on Code § 362(d)(1) or (2) for relief. Due to the fact that its arguments are grounded in Code § 362(d)(1), which provides from relief from the stay for "cause," the Court will focus on this section of the Code.

[7]The Second Circuit in *Sonnax* listed twelve factors, the *Curtis* factors, that can be weighed in determining whether to modify the stay to permit litigation by a creditor in another forum. 907 F.2d at 1286 (citing *In re Curtis*, 40 B.R. 795 (Bankr. D. Utah 1984)). Although the Second Circuit has not specifically addressed the issue of what constitutes "cause" to annul the automatic stay, the Court finds that the last *Curtis* factor, which involves a balancing of the harms, is relevant to the Court's determination of "cause" in the matter before it. *See United States v. Northland Associates, Inc.* (*In re Abrantes Const. Corp.*), 132 B.R. 234, 238 (N.D.N.Y. 1991) (holding that a court must analyze the *Curtis* factors to determine whether "cause" exists

proof to show "cause" for relief. *See id*. at 1285. Courts balance the equities to determine whether there is cause to grant retroactive relief from the automatic stay. *See National Envtl. Waste Corp. v. City of Riverside (In re National Envtl. Waste Corp*.), 129 F.3d 1052, 1055 (9th Cir. 1997). The factors that courts consider are the following: the harm to the creditor, the moving party, if the stay is not annulled; any unjust harm to the debtor or other creditors if the stay is annulled; whether the moving party would have been granted relief for cause had it sought relief prior to its violation of the automatic stay; whether the violation by the creditor was wilful. *See id.* at 1055-56*; In re Siverling*, 179 B.R. 909, 911-12 (Bankr. E.D. Cal. 1995), *aff'd*, No. CIV.S-95-470 WBS, 1996 WL 169083, (E.D. Cal. April 9, 1996).

The Court analyzes the factors to determine whether the equities weigh in favor of granting the IRS retroactive relief from the automatic stay. The Court finds that the violation of the automatic stay by the IRS was not willful. In fact, the IRS filed its Tax Lien on December 22, 1995, relying on the Court's Discharge Order, dated December 8, 1995. The IRS was unaware of the subsequent Order of the Court, dated December 15, 1995, which vacated the Discharge Order. However, this factor alone is not dispositive of whether there is cause to grant the IRS retroactive relief from the automatic stay. Next, the Court considers whether it would have found cause for relief from the stay had the IRS sought such relief before filing its Tax Lien. The Court would have balanced the harms to determine whether there was sufficient "cause." The IRS is harmed in that it is unable to file a tax lien against the Debtor. However, this harm is no different than the harm suffered by all the creditors whose actions are also stayed by Code § 362(a). The automatic stay "protects creditors in a manner consistent with the bankruptcy goal

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to grant relief from the stay).

of equal treatment." *Lincoln Savings Bank, FSB v. Suffolk County Treasurer* (*In re Parr Meadow Racing, Ass'n*), 880 F.2d 1540, 1545 (2d Cir. 1989) (citations omitted). Therefore, there would have been no reason to treat the IRS differently than the other creditors. Also, the unsecured creditors are harmed if the Court allowed the IRS to file its tax lien because there would then be less available assets for distribution to the unsecured creditors. Therefore, the Court finds that if the IRS had sought relief prior to filing its Tax Lien, the Court would not have found sufficient cause to grant relief from the Stay because of the lack of any distinct harm to the IRS and the harm to other unsecured creditors. This factor weighs against granting retroactive relief to the IRS.

Next, the Court examines the possible harm to the IRS if its relief from the Stay is not granted. The IRS now claims that it *may* be prejudiced if the stay is not lifted retroactively because its priority *may* be subordinated to other post-petition lien creditors. In *In re Sterling*, the bankruptcy court granted the IRS retroactive relief from the automatic stay to validate its tax assessment and preserve its claim against the debtor. 179 B.R at 912. In *Sterling*, the IRS and the debtor entered into a settlement agreement whereby the IRS had a year to file an assessment against the Debtor. *Id*. at 910. Prior to the end of the year period, the Debtor filed a petition for relief pursuant to chapter 13 of the Code and subsequently, the IRS made tax assessments in violation of the stay. *See id*. at 911. The court in *Sterling* noted that the applicable period for making a tax assessment had now expired. *See id*. Therefore, the court found that there was a sufficient level of harm to the IRS if the stay was not annulled because the IRS would be unable to collect its valid claim. *See id*. at 912. The Court finds *Sterling* distinguishable from the matter before the Court because here the IRS has not claimed that it will be time-barred from filing a

future tax lien against the Debtor. Thus, the IRS's claim of harm does not rise to a sufficient level of harm that would weigh in favor of granting retroactive relief. The Debtor has argued that he would be harmed if retroactive relief is granted to the IRS because he cannot then consummate the stipulation he made in state court with his former wife; thus, there may be harm to the Debtor if the Stay is retroactively annulled. The Court finds that the insufficient level of harm to the IRS coupled with the fact that the Court would not have granted the IRS relief weigh in favor of disallowing retroactive relief from the stay irrespective of any harm to the Debtor.

Based upon the foregoing, it is hereby

ORDERED**,** that the IRS's Cross-Motion to annul the automatic stay is denied; and it is further

ORDERED**,** that the Debtor's Motion to vacate the federal tax liens is granted.

Dated at Utica, New York

this 13th day of March 1998

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge